Supreme Court, U.S.
FILED
JUN 9 - 2000
CLERK

(2)

No. 99-1788

In The

Supreme Court of the United States

PFIZER INC,

Petitioner,

vs.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL JORDAN
Texas State Bar No. 11006900
Counsel of Record for Texas Property and Casualty Insurance Guaranty Association
JORDAN & CARMONA
A Professional Corporation
1801 South Mopac Expy., Suite 220
Austin, Texas 78746
Telephone: (512) 482-9400
Facsimile: (512) 482-0515

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

QUESTIONS PRESENTED

1. Whether this Court should overrule *Carden v. Arkoma Associates* and adopt a different rule that requires federal courts to engage in a feature-by-feature comparison of non-corporate entities to determine whether those entities should be treated as corporations for purposes of diversity of citizenship jurisdiction.

2. Whether the Texas Property and Casualty Insurance Guaranty Association should be treated as a corporation or as an unincorporated association for purposes of diversity of citizenship jurisdiction, if the Court overrules *Carden v. Arkoma Associates.*

The Texas Property and Casualty Insurance Guaranty Association does not agree that Questions 4 and 5 in Pfizer's Petition for Writ of Certiorari are properly presented, since any resolution of the questions above would make Question 4 and 5 moot.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND AUTHORITIES 4

CONCLUSION 19

PRAYER 20

TABLE OF AUTHORITIES

Page

CASES

Carden v. Arkoma Associates, 494 U.S. 185 (1990) ..... *passim*

Chapman v. Barney, 129 U.S. 677 (1889) ..... *passim*

Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900) 9, 10, 12

International Insurance Co. v. Virginia Ins. Guaranty Assn., 649 F.Supp. 58 (E.D. Va. 1986) 6

Iowa Ins. Guaranty Assn. v. New England Ins. Co., 701 F.Supp. 177 (S.D. Iowa 1988) 5

Navarro Savings Assn. v. Lee, 446 U.S. 458 (1980) .. 7, 8, 12

Newport Limited v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir. 1991) 6

Office of Public Insurance Counsel v. Texas Automobile Insurance Plan, 860 S.W.2d 231 (Tex. App. – Austin 1993) 15

Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 5, 7, 9, 11

Rhulen Agency v. Alabama Insurance Guaranty Association, 896 F.2d 674 (2nd Cir. 1990) 5

Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) ..... *passim*

Temple Drilling Co. v. Louisiana Insurance Guaranty Association, 946 F.2d 390 (5th Cir. 1991) 2, 5

Texas Catastrophe Property Insurance Association v. Morales, 975 F.2d 1178 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) 16

Trombino v. Transit Cas. Co., 110 F.R.D. 139 (D.R.I. 1986) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1332 ..... 1, 11, 19

Texas Insurance Code art. 1.14-1 16

Texas Insurance Code art. 21.28-C 14, 15, 16

Texas Insurance Code art. 21.49 17

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Texas Property and Casualty Insurance Guaranty Association (the "TPCIGA") submits the following Brief in Opposition to Pfizer, Inc.'s ("Pfizer") Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves Pfizer, Inc.'s appeal from the Fifth Circuit Court of Appeals' order affirming the order of the trial court dismissing this case for want of subject matter jurisdiction. It is undisputed that Pfizer, Inc. is a citizen of New York, its principal place of business, and Delaware, its state of incorporation. Similarly, it is undisputed that the TPCIGA is an unincorporated association with its principal place of business in Texas, and that one or more of the TPCIGA's member insurers is a citizen of New York.

The Court of Appeals correctly affirmed the trial court's holding that because the TPCIGA is an unincorporated association, its citizenship for purposes of determining whether diversity jurisdiction exists is in any state where its members are citizens. Since both Pfizer and one or more of the TPCIGA's member insurers are citizens of New York, the Court of Appeals correctly affirmed the trial court, which found that subject matter jurisdiction did not exist under 28 U.S.C. §1332 because there is no diversity of citizenship between the parties.

SUMMARY OF THE ARGUMENT

Under *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990), and the precedents it follows, this Court has consistently held that the citizenship of non-corporate entities must be determined by looking to the citizenship of their members or partners, and that such entities cannot be assimilated to the status of a corporation by engaging in a detailed analysis of their specific characteristics. The Fifth Circuit correctly applied the bright line rule established in *Carden* to insurance guaranty associations in this case. It had previously determined the identical issues presented in this case in *Temple Drilling Co. v. Louisiana Insurance Guaranty Association*, 946 F.2d 390, 393-394 (5th Cir. 1991). Every other federal court that has considered the question of whether insurance guaranty associations created by statute as unincorporated associations should be treated as corporations for purposes of diversity of citizenship jurisdiction has held that guaranty associations should be treated as unincorporated associations.

Although Pfizer asserts that *Carden* does not clearly establish a bright line test which distinguishes between corporations and non-corporate legal entities, this is clearly the holding of *Carden* and the precedents it followed. Pfizer does not cite a single federal case in which *Carden* was read to allow federal courts to engage in a fact-specific inquiry to determine whether a particular non-corporate legal entity should be treated as a corporation for diversity purposes. Therefore, Pfizer is effectively requesting that this Court overrule *Carden*.

This Court should not overrule *Carden*, since Congress has enacted legislation giving special treatment to

corporations in determining citizenship for purposes of diversity jurisdiction, and the Court correctly determined that it should defer to Congress on this issue. Additionally, the Court in *Carden* correctly observed that engaging in a fact-specific inquiry at the outset of litigation to establish whether subject matter jurisdiction exists would result in the consumption of scarce judicial resources and raise the cost of litigation to all parties.

Pfizer's assertions that the TPCIGA is effectively an agency of the State of Texas, and that its operations are managed and controlled by the Commissioner of Insurance, are not supported either by the TPCIGA's enabling statute or by Texas case law involving similar statutorily-created associations of insurers.

Additionally, even if this Court were to abandon *Carden*, and were to engage in a "real party in interest" analysis as urged by Pfizer to determine the extent to which the members of the TPCIGA have control over the affairs of the TPCIGA or have a financial stake in litigation involving the TPCIGA, the TPCIGA should not be treated as a corporation for diversity jurisdiction purposes. The TPCIGA is governed by a board of directors, and its member insurers select a majority of the board of directors. In addition, the TPCIGA's member insurers have a direct and significant financial stake in the outcome of litigation involving the TPCIGA. Unlike a limited partner, the TPCIGA's member insurers are required to pay assessments as necessary for the TPCIGA to discharge its statutory obligations, and there is no fixed limit on the amount which may be assessed. Therefore, under a "real party in interest" analysis, the financial stake of member insurers in the TPCIGA is much more like that of

a general partner than of a limited partner or a corporate shareholder.

Finally, the Texas Legislature did not infringe on any constitutional right held by Pfizer when it created the TPCIGA as an unincorporated association instead of creating it as a corporation. There is simply no constitutional or other legal right to have non-corporate entities treated as corporations for purposes of determining diversity of citizenship jurisdiction.

ARGUMENT AND AUTHORITIES

Pfizer is asking the Court to overrule *Carden*, not to clarify it.

In its Petition for Writ of Certiorari, Pfizer ostensibly asks this Court to "clarify" that *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) did not establish a "bright line" rule which precludes federal courts from considering whether non-corporate legal entities should be treated as corporations for purposes of determining whether diversity of citizenship exists. Pfizer's real problem is not that *Carden* lacks clarity, but instead that *Carden* and the precedents it follows, such as *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) speak with unmistakable clarity.

In *Carden*, this Court clearly stated that its prior decision in *Bouligny*, as well as the line of precedents dating back to *Chapman v. Barney*, 129 U.S. 677 (1889), preclude federal courts from engaging in a feature-by-feature comparison of non-corporate entities to corporations to determine whether they should be treated as

corporations or partnerships for diversity of citizenship purposes:

> There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican sociedad en comandita) would be treated for purposes of the diversity statute to what *Russell* called the " 'tradition of the common law,' which is to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

Carden, 494 U.S. at 190 (quoting *Russell*, 288 U.S. at 480).

Indeed, every federal court which has considered this issue in the context of insurance guaranty associations has followed the bright line rule established in *Carden* and *Bouligny*, and have held that for purposes of diversity jurisdiction, insurance guaranty associations are citizens of every state where their member insurers are citizens.[1] *Temple Drilling Co. v. Louisiana Ins. Guaranty Assn.*, 946 F.2d 390, 393-94 (5th Cir. 1991); *Rhulen Agency v. Alabama Ins. Guaranty Assn.*, 896 F.2d 674 (2nd Cir. 1990); *Iowa Insurance Guaranty Association v. New England*

---

[1] As the Court noted in *Rhulen*, insurance guaranty associations in most states are created by statute as unincorporated associations. This is because most state legislatures have enacted statutes that follow the NAIC Post-Assessment Property and Liability Insurance Guaranty Association Model Act. Therefore, if this Court were to hold that the Texas Guaranty Act is unconstitutional, as Pfizer urges, the Court's ruling would call into question the validity of the vast majority of guaranty association laws enacted by states throughout the nation.

Ins. Co., 701 F. Supp. 177, 178-79 (S.D. Iowa 1988); *International Insurance Co. v. Virginia Insurance Guaranty Assn.*, 649 F.Supp. 58, 61 (E.D. Va. 1986); *Trombino v. Transit Cas. Co.*, 110 F.R.D. 139, 144 (D.R.I. 1986).

Significantly, Pfizer fails to cite a single instance in which any federal court at the Court of Appeals or District Court level has failed to understand the clear rules set forth in *Carden* and the precedents it follows. Nor does Pfizer point to any language of the *Carden* opinion that has or could even possibly create confusion or ambiguity about its effect. Indeed, Pfizer cannot point to any federal court that has adopted its tortured reading of *Carden*. In fact, Pfizer does not mention any court that has even suggested that *Carden* and *Bouligny* leave any room for the sort of characteristic-by-characteristic comparison of business entities they condemn.

For instance, this Court's holding in *Carden* is clearly understood by the Fifth Circuit, the Court of Appeals from which both this case and *Carden* were brought to this Court. In *Newport Limited v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), the Fifth Circuit stated that the sort of "real party in interest" analysis of the members or partners of non-corporate entities advocated by Pfizer is simply not permitted under *Carden*:

> In its brief, Sears painstakingly points out the parallel, but not precisely identical, civil law origins of the Puerto Rican *sociedad en comandita* and the Louisiana partnership *in commendam*. In so doing, Sears misperceives the teaching of *Carden*, which essentially forecloses the characteristic-by-characteristic inquiry which Sears would have us undertake today . . . The Court

> [in *Carden*] suggested that any change in the jurisdictional treatment accorded these entities should be addressed to the Congress and not the courts . . . We find little support for the suggestion that the Supreme Court intended an exception for any entity other than a *sociedad en comandita*, especially for one which on its face is indistinguishable from an ordinary limited partnership.

Id. at 305-07.

Therefore, while Pfizer attempts to disguise the substance of its request to this Court as "clarification," Pfizer is effectively asking this Court to overrule *Carden* and the extensive line of precedents it follows, not to clarify them. This would confuse rather than clarify the law in this area. In addition, for the reasons discussed below, there are no sound legal or policy reasons why the Court should accept Pfizer's invitation to revisit the issues this Court has settled in *Carden* and *Bouligny*.

The applicable case precedents do not support Pfizer's legal arguments.

The legal arguments Pfizer asserts in support of its Petition for Writ of Certiorari are not supported by the applicable case law. For instance, Pfizer claims to have found exceptions to the bright line rule which precludes federal courts from treating non-corporate entities as corporations in *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980) and *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). Pfizer's Petition at 7-8. The same arguments were considered and rejected by the Court in *Carden*.

In *Carden*, it was argued that *Navarro Savings* was authority for the proposition that federal courts should engage in a "real party in interest" analysis to determine whether a non-corporate legal entity should be considered to be a citizen where its members are citizens, or whether it should be treated as a corporation. Pfizer has advanced the same argument in this case. However, in *Carden*, this Court made it clear that the "real party in interest" analysis of *Navarro Savings* is not applicable to the question of whether non-corporate entities may be treated as corporations for purposes of diversity of citizenship jurisdiction, and that its application by analogy was wholly unpersuasive:

> Arkoma claims to have found another exception to our *Chapman* tradition in *Navarro Savings Assn. v. Lee* [citation omitted]. That case, however, did not involve the question whether a party that is an artificial entity other than a corporation can be considered a "citizen" of a State, but the quite separate question whether parties that were undoubtedly "citizens" (viz., natural persons) were the real parties to the controversy . . . *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to respondent the argument that by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also should it be taken into account for purposes of determining whether an artificial entity is a citizen. That argument is, to put it mildly, less than compelling.

Carden, supra, at 494 U.S. 191-92.

In contrast, the Court in *Carden* acknowledged that *Puerto Rico v. Russell* was in fact an exception to the line of precedents beginning with *Chapman v. Barney*. However, it also noted that the approach used in *Russell* "was proposed and specifically rejected in *Bouligny*." *Carden, supra*, at 190. Therefore, while *Russell* can fairly be read as an exception to the rule established by the line of cases following *Chapman v. Barney*, the Court's discussion in *Carden* indicates that *Russell* is a case involving a unique business entity organized under a Spanish civil law tradition, and that its application is likely limited to its facts. *Id.*

Pfizer also incorrectly describes *Chapman v. Barney*, 129 U.S. 677 (1889), *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), and *Steelworkers v. R. H. Bouligny, supra*, as cases in which the Court engaged an analysis of the business entities in question and "found that the organization under investigation did not have citizenship distinct from its members." Pfizer's Petition at 9. Contrary to Pfizer's argument, none of those cases involved a detailed analysis of the extent to which the members of the non-corporate business entities in question controlled the governance and operations of the organizations in question. Instead, all of these cases specifically applied the bright line rule followed in *Carden*. For instance, in *Chapman*, the Court applied the clear distinction made by Congress between the citizenship of corporations and non-corporate entities. The Court in *Chapman* held that because the joint-stock association was a partnership, and not a corporation, diversity jurisdiction must be based on the citizenship of the members of the joint-stock association:

> But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction unless it be a corporation. The allegation is that the company is not a corporation, but a joint-stock company – that is, a mere partnership.

Chapman, supra, 129 U.S. 682.

Similarly, the Court in *Great Southern* noted that while the "limited partnership association" in question had "some of the characteristics of a corporation," Courts were precluded from extending that rule to non-corporate entities. *Great Southern, supra,* at 457. The Court in *Bouligny* followed *Chapman* and *Great Southern* in declining to engage in a detailed analysis of the characteristics of a labor union in order to determine whether a labor union should be treated as a corporation for diversity purposes. Instead, the Court in *Bouligny* deferred to the statutory distinction that had been made between corporations and non-corporate entities by Congress:

> Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument . . .

Bouligny, 382 U.S. at 153.

In summary, *Carden* and the line of precedents it follows make it clear that for non-corporate entities such as the TPCIGA, the citizenship of the TPCIGA must be

determined by reference to the citizenship of its members. Pfizer fails to identify any case precedent other than *Russell* that would fairly support any other result, and the approach used in *Russell* was clearly rejected in *Bouligny* and *Carden*. Accordingly, both the trial court and the Fifth Circuit correctly applied the applicable law as announced by this Court. This Court does not need to revisit these issues in this case, and it should decline Pfizer's invitation to reconsider its well-settled and clear precedents on this issue.

There are important policy reasons for continued adherence to the bright line test set forth in *Carden*.

Pfizer fails to acknowledge, let alone address, the legitimate public policy reasons advanced by the Court in *Carden* for its continuing adherence to the bright line rules established in *Chapman* and *Bouligny*. First, the *Carden* Court recognized that engaging in a case-by-case analysis of the nature of various sorts of non-corporate legal entities does not afford appropriate judicial deference to the legislative power of Congress. The Court in *Carden* was not unaware of the arguments in favor of applying a flexible and fact-specific approach to the analysis of whether modern non-corporate business entities should be treated as corporations for diversity purposes. Nevertheless, it elected to honor "the more important policy of leaving that [decision] to the people's elected representatives." *Carden, supra,* at 197.

In 28 U.S.C. §1332(c)(1), Congress provided for purposes of diversity of citizenship jurisdiction, "a corporation shall be deemed to be a citizen of any State by which

it has been incorporated and of the state where it has its principal place of business . . . " The Court in *Carden* noted that Congress amended the diversity jurisdiction statute in 1958, and was undoubtedly aware at that time that a wide variety of non-corporate entities existed, but nevertheless did not make any provision for treating non-corporate entities as corporations:

> No provision was made for the treatment of artificial entities other than corporations, although the existence of many new, post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the sort of Massachusetts business trust at issue in *Navarro*, must have been obvious.

Carden, supra, at 196-97.

Therefore, while the diversity statute clearly provides special treatment to corporations, it just as clearly does *not* provide such treatment to non-corporate legal entities. In its Petition for Writ of Certiorari, Pfizer does not address the effect of the diversity statute or make any argument, principled or otherwise, that Congress intended the statute to apply to legal entities other than corporations. To the contrary, Pfizer fails to address in any manner the legitimate separation of powers issues which would be raised if this Court abandoned its traditional deference to Congress in this area, and instead (as Pfizer requests) judicially expanded the scope of federal diversity jurisdiction beyond what is allowed under the plain language of the diversity statute.

The *Carden* Court also noted if federal courts were required to engage in a fact-intensive inquiry to determine whether a particular non-corporate entity should be treated as a corporation for diversity of citizenship purposes, such a procedure would impose substantial burden upon both courts and litigants. In this regard, the Court in *Carden* recognized that fact-intensive disputes about the degree of control exercised over a non-corporate organization by its members will undoubtedly raise "questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction." *Id.* While Pfizer argues that such a procedure should be permitted, it wholly ignores the costs such a procedure would impose, both in terms of judicial time and resources and increased costs to parties involved in litigation.

The Court in *Carden* determined that these important policy considerations override the competing policy considerations raised by previous parties who have argued, as Pfizer does, that the bright line rule in *Carden* should be abandoned. Pfizer does not furnish the Court with any reasons why it should reconsider this decision.

Even if the Court were to abandon the bright line rule followed in *Carden*, the Texas Property and Casualty Insurance Guaranty Association should not be treated as a corporation, since its members have significant control over its management, and since its members' liability for assessments has no maximum limit.

In its Petition for Writ of Certiorari, Pfizer makes numerous misrepresentations to the effect that the TPCIGA is directly controlled by the Commissioner of

Insurance and is effectively a state agency. For instance, Pfizer states, *inter alia*, that the TPCIGA:

1) "is a quasi-governmental agency controlled by the State of Texas" (Pfizer's Petition at 3);

2) "was created by the Texas Legislature to perform a public function, namely regulation of Texas Admitted Carriers" (Pfizer's Petition at 5);

3) "is regulated by the State of Texas, and is directly administered by the Texas Insurance Commissioner, an official of the State of Texas" (Pfizer's Petition at 5-6);

4) " 'members' of the TPCIGA "have no control over the Fund's assets, business or involvement in litigation" and that "these functions are carried out by the Texas Attorney General and the Insurance Commissioner – officials of the State of Texas" (Pfizer's Petition at 9); and

5) "All funds collected by the Texas Fund must be deposited with the Texas Treasury Safekeeping Trust Company" (Pfizer's Petition at 11).

While the TPCIGA is clearly created by statute, Pfizer's assertions about the nature of the TPCIGA are materially incorrect and are not consistent with the language of Texas Insurance Code art. 21.28-C, the enabling statute which governs the TPCIGA. While Pfizer's incorrect assertions are not germane unless this Court abandons *Carden* and the line of precedents beginning with *Chapman*, the TPCIGA is compelled to respond to the inaccuracies set forth in Pfizer's Petition for Writ of Certiorari.

First, the TPCIGA is not a state agency, nor is it directly administered by the Commissioner of Insurance.[2] Instead, the TPCIGA is governed by a board of directors. A majority of the board of directors are selected by the TPCIGA's member insurers. Texas Insurance Code art. 21.28-C, §§6-7.

While the Commissioner of Insurance undoubtedly exercises oversight over the TPCIGA's operations, the Commissioner's oversight does not allow the Commissioner to directly govern the operations of the TPCIGA. Texas Insurance Code art. 21.28-C, §6 clearly states that "The Association shall perform its functions under a plan of operation approved under Section 9 of this Act and shall exercise its powers through the board of directors." In *Office of Public Insurance Counsel v. Texas Automobile Insurance Plan*, 860 S.W.2d 231, 236 (Tex. App. – Austin 1993), the Court held that an order entered by the State Board of Insurance (The State Board of Insurance has since been eliminated, and the Commissioner of Insurance is now the executive authority over the Texas Department of Insurance) was illegal because "TAIP, not the Board, is the agency vested with power to govern the assigned risk plan and is subject only to the Board's oversight." Like the TAIP, the TPCIGA is a statutorily created organization of private insurers, and it is governed by its own board of directors. *OPIC v. TAIP* indicates that a state agency's "oversight" of an entity created

---

[2] If the TPCIGA were in fact an agency of the State of Texas, as Pfizer suggests, the Eleventh Amendment would probably preclude federal courts from asserting jurisdiction over Pfizer's claims against the TPCIGA.

by statute and composed of private businesses cannot override statutory provisions that empower the governing board of the entity to generally manage and control its operations.

In some cases, Pfizer's assertions simply ignore the plain language of the TPCIGA's enabling statute. For instance, Pfizer asserts that "All funds collected by [the TPCIGA] must be deposited with the Texas Treasury Safekeeping Trust Company. Pfizer's Petition at 11. Contrary to Pfizer's mischaracterization, the statute cited by Pfizer is permissive, not mandatory, and clearly states that the TPCIGA's board of directors "*may* deposit all money collected by the association into the Texas Treasury Safekeeping Trust Company . . . " Texas Insurance Code art. 21.28-C, §8(j). In fact, the TPCIGA maintains its funds in accounts with banks and investment managers. Similarly, contrary to Pfizer's incorrect description of the TPCIGA as a mere "fund of money," the TPCIGA is empowered to engage in a wide variety of activities as necessary to handle and pay covered claims. Texas Insurance Code art. 21.28-C, §8. However, those powers do not allow the TPCIGA to regulate admitted insurance carriers in Texas, as Pfizer indicates. Instead, the Commissioner of Insurance regulates the insurance business in Texas, not the TPCIGA. Texas Insurance Code art. 1.14-1.

In *Texas Catastrophe Property Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993), the Attorney General unsuccessfully argued that a statutorily-created association of insurers similar to the TPCIGA was a state agency. Like the TPCIGA, property insurers must be members of the "Catpool" as a condition of being a licensed property insurer in Texas.

Texas Insurance Code art. 21.49, §4. Also like the TPCIGA, the "Catpool" also operates under a plan of operation that must be approved by the Commissioner of Insurance. Texas Insurance Code art. 21.49, §5(c). The member insurers of the "Catpool" are subject to assessments to pay claims, just as the member insurers of the TPCIGA are subject to assessments to pay claims. Texas Insurance Code art. 21.49, §19. Despite these facts, the Fifth Circuit held that the "Catpool" was not an agency of the State of Texas, because its funds were separate from those of the State of Texas.

Like the "Catpool," the finances of the TPCIGA are separate from those of the State of Texas. Texas Insurance Code art. 21.28-C, §8(c) provides that "the association shall assess insurers amounts necessary to pay the obligations of the association under Subsection (a) of this section after an insolvency, the expenses of handling covered claims subsequent to an insolvency, and other expenses authorized under this Act." *See also* Texas Insurance Code art. 21.28-C, §18(a) and (b). Therefore, every additional dollar paid in claims is an additional dollar that must be collected from TPCIGA member insurers by way of assessments. If the TPCIGA collects assessments in a particular line of insurance which turn out to be in excess of the amount needed to handle and pay covered claims, the excess funds do not escheat to the State of Texas, but are instead refunded to the TPCIGA's members in proportion to each member's contribution to the prior assessments. Texas Insurance Code art. 21.28-C, §20(c). These provisions make it clear that the TPCIGA's funds are not state funds, and that the TPCIGA is not a state agency.

Pfizer also incorrectly asserts that the TPCIGA "has no real members," and that its members have no real financial stake in its operations. In fact, the member insurers of the TPCIGA have a much more direct and significant financial stake in the outcome of any litigation brought against the TPCIGA than a corporate shareholder or a limited partner of a partnership. Under the statutes described above, the members of the TPCIGA are required to pay assessments as necessary to pay the statutory obligations of the TPCIGA. In contrast, neither a shareholder of a corporation nor a limited partner of a partnership is liable to creditors of the corporation or partnership in the event that the corporation or partnership assets and income are not sufficient to pay the financial obligations of that business entity. Unlike a member insurer of the TPCIGA, a corporate shareholder or limited partner can only lose as much as they have invested in the business. Therefore, even if this Court were to depart from its own precedents and engage in the sort of detailed analysis which is expressly prohibited under *Carden*, the Court would find that the members of the TPCIGA have a much greater financial stake in the TPCIGA's operations than a corporate shareholder or a limited partner of a limited partnership.

The Texas Legislature did not infringe on any constitutional right by creating the TPCIGA as an unincorporated association rather than as a corporation.

Pfizer argues that the Texas Legislature illegally interfered with the assertion of federal jurisdiction by creating the TPCIGA as an unincorporated association rather than as a corporation. This argument is entirely

circular, since *Carden* and the case law precedents it followed make it clear that there is no legal right, let alone any constitutional right, to treat non-corporate entities as corporations for purposes of determining diversity jurisdiction. Congress enacted 28 U.S.C. §1332(c)(1) to apply only to corporations. That statute, as interpreted by the Court in *Bouligny* and *Carden*, precludes federal courts from affording corporate treatment to non-corporate entities.

Therefore, this Court has made it clear that Pfizer's complaint is not properly directed to this Court, to the Texas Legislature, but instead to Congress. Congress clearly could have chosen to expand diversity jurisdiction by amending this statute to allow such treatment to be afforded to non-corporate entities. As discussed in *Carden*, Congress has not chosen to do so, despite the fact that Congress is undoubtedly aware that States have enacted laws which both create non-corporate legal entities, and which allow private persons to create such entities. Pfizer's arguments to the effect that such laws impermissibly infringe on the jurisdiction of federal courts must fail, because they disregard the limits of federal diversity jurisdiction as provided by Congress in 28 U.S.C. §1332(c)(1).

CONCLUSION

This Court should continue to defer to Congress, and to follow the bright line rule set forth in *Carden v. Arkoma Associates*.

PRAYER

The Texas Property and Casualty Insurance Guaranty Association respectfully requests that Pfizer's Petition for Writ of Certiorari be denied.

Respectfully submitted,

DANIEL JORDAN
Texas State Bar No. 11006900

Counsel of Record for Texas Property and Casualty Insurance Guaranty Association

JORDAN & CARMONA
A Professional Corporation
1801 South Mopac Expy., Suite 220
Austin, Texas 78746
Telephone: (512) 482-9400
Facsimile: (512) 482-0515